in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here."

That may not be a very profound statement of law. It does, however, contain a very great deal of very profound sense and to my mind it can and should be applied in the present case.

For myself I would allow the appeal.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

ONG HOO HONG v. KOK YIN WENG

[O.C.J. (Hepworth J.) March 12, 1965]

[Penang — Civil Suit No. 326 of 1963]

Trespass — Action by one co-owner to oust other co-owner — Circumstances under which an action for trespass will lie.

Land — Co-owner — When co-owner can bring action for trespass.

The plaintiff who was the legal owner of a 24/80th undivided share in the premises No. 330-A Chulia Street, Penang, claimed against the defendant for recovery of possession of the said undivided share and for damages for trespass. The defendant was the legal owner of a 56/80th undivided share in the premises as trustee for the Phun Yue Wooi Koon Association, which had gone into occupation of the premises.

Held: one co-owner of land can only bring an action of trespass against the other if he has been actually ousted, or dispossessed of the land and as in this case there was no evidence that the plaintiff had attempted to enter into occupation of the premises or any part thereof, or that he had been excluded or prevented from entering the premises, his claim must fail.

Cases referred to:—

(1) *Murray* v. *Hall* 137 E.R. 175.

(2) *Jacobs* v. *Seward* (1872) L.R. 5 H.L. 464.

CIVIL SUIT.

Ong Huck Lim for the plaintiff.

O. L. Phipps for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff is the legal owner of a 24/80th undivided share in land known as Lot 228(1), Town Subdivision 19, North East District of Penang, together with the premises No. 330-A Chulia Street, Penang, erected thereon (hereinafter referred to as the said premises).

The defendant is the president of Phun Yue Wooi Koon, a registered association (hereinafter referred to as the association), and is sued as such. The defendant is the legal owner of a 56/80th undivided share in the said premises as trustee for the association.

The defendant, as trustee for the association, purchased a 14/80th undivided share in the said premises on the 7th October, 1961, a further 14/80th undivided share on the 14th October, 1961, a further 7/80th undivided share on the same date, the 14th October, 1961, a further 14/80th undivided share on the 23rd October, 1961, and a further 7/80th undivided share on the 27th November, 1961.

The plaintiff purchased his 24/80th undivided share in the said premises on the 9th February, 1962.

The association went into occupation of the said premises in August, 1963, without reference to the plaintiff. At that time the said premises were vacant and unoccupied.

On or about the month of September, 1963, the defendant carried out repairs to the said premises with the permission of the City Council, Penang. These repairs were repairs which the City Council by nuisance notice No. 561 dated the 19th November, 1960, to the then owners of the said premises had required to be done. During the carrying out of these repairs certain unauthorised alterations or additions were made without the defendant's or the association's knowledge or consent, with the result that the city architect and building surveyor issued a notice to cease work on the repairs forthwith.

Thereupon the plaintiff through his solicitors issued a notice dated the 21st October, 1963, addressed to the association requesting and requiring the association to quit and deliver up peaceable vacant possession of his 24/80th undivided share of and in the said premises within 2 weeks on the ground that the association were trespassing therein and were in unlawful occupation thereof in so far as his share was concerned.

The association failed and still fails to comply with the said notice.

The plaintiff therefore claims against the defendant for recovery of possession of the plaintiff's 24/80th undivided share of and in the said premises, and for damages for wrongfully entering and occupying the plaintiff's said share in the said premises.

The defendant denies that the association are in wrongful occupation of the said premises as a trespasser or at all. The defendant pleads that the occupation of the said premises by the association is an exercise by the association of their rights as beneficial and equitable owners of the said 56/80th undivided share in the said premises. Alternatively the defendant pleads

that the association entered into and remained in occupation of the said premises with the authority of the defendant as the person in whom the 56/80th undivided share in the said premises is vested in fee simple.

Before they went into occupation of the said premises the association, after various religious ceremonies to ascertain the wishes of the ancestral deities of the clan, were advised by the oracle that the said premises was the most favourable place for the installation and the proper keeping of the ancestral tablets of the deceaseds' kinsmen in the clan and that they should accordingly be installed, cared for and worshipped there. The association thus moved in with the consent of the defendant and have duly, with all religious ceremonial, installed the tablets. They believe that to move out and remove the ancestral tablets would constitute an affront to the deities. The said premises are therefore in use today as a *Kongsi* house.

In the early periods of the history of our law, might seems to some extent to have been confounded with right and actual possession to have been more highly favoured than property or the legal right to possession. Where at the time of the commission of any trespass upon land the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he seems to have been without remedy for such trespass. In the course of time, however, the injustice of not extending to the right to possession the remedies which were allowed to have possession came to be recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued. The courts, however, did not go the whole length of treating the right to possession as *per se* equivalent to possession. They still required that a plaintiff who seeks to recover damages for a trespass committed while he was out of possession should, before action brought, go through the form of entry or which is equivalent, of making a formal claim (*Clerk & Lindsell* on Torts, 12th Edition, 1149).

One co-owner of land can only bring an action of trespass against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass (*Murray* v. *Hall* [1]). In *Jacobs* v. *Seward* [2] it was held that putting a lock on a gate (not kept locked) is not enough. In his judgment Lord Hatherley, the Lord Chancellor, said that even if there had been a finding that the gate was locked, that would not have been sufficient unless it had been shown that the plaintiff was excluded by that locking, or that on some occasion when he applied to have it opened it was not opened. Nothing passed between the parties which showed that the intention of putting the lock there was to exclude the co-tenant in common. There was nothing in the circumstances from which the inference of exclusion was to be drawn.

It is not contested in the present case that the plaintiff has never attempted to enter into occupation of the said premises or any part thereof. Neither the defendant nor the association has ever excluded or prevented the plaintiff from entering the said premises or any part thereof. Can it be said that the user of the said premises by the association as a *Kongsi* house by itself constitutes actual ouster or dispossession of the plaintiff? I do not think it can. I do not think it can be said that the defendant is using the said premises other than in an ordinary and natural way and in such circumstances there is no trespass.

The plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: *Ong Huck Lim & Co.; Lim Kean Siew & Co.*

YONG UNG KAI v. ENTING

[O.C.J. (McGilligan J.) March 13, 1965]

[Sibu — Civil Suit No. 64 of 1964]

Contract — Implied term — Frustration — Whether Law Reform (Frustrated Contracts) Act, 1943 is a statute of general application — Application of Laws Ordinance (Cap. 2).

The defendant entered into a written agreement with the plaintiff for the sale of timber on land in which a tribe had communal customary rights. In order to cut the timber a licence from the forests department was required. The written agreement did not refer to the necessity of obtaining a licence. The defendant did his best to get a licence but this was refused. On a claim for breach of contract,

Held: (1) there was an implied term that the sale of the timber was to be subject to the obtaining of the necessary licence;

(2) as the licence was refused the contract became impossible to perform because of frustration and the plaintiff was therefore entitled to the return of moneys advanced by him to the defendant under the terms of the agreement.

Semble: The Law Reform (Frustrated Contracts) Act, 1943, is a statute of general application and hence by virtue of the Application of Laws Ordinance is in force and of effect in Sarawak.

Cases referred to:—

(1) *Shirlaw* v. *Southern Foundaries (1928) Ltd.* [1938] 2 K.B. 227.

(2) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.